

# CHARITABLE TRUSTS AND ADVANCEMENT OF RELIGION: ON A WHIM AND A PRAYER?

*Juliet Chevalier-Watts\**

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*The advancement of religion is a controversial head of charitable trusts: whilst its foundations are based on tenets of intangible belief systems, New Zealand law, alongside other common law jurisdictions, supports the notion that the public benefit requirement of all charitable trusts be presumed in this particular head. Common law also reflects decades of evolution of the interpretation of the advancement of religion, thus not limiting the advancement of religion to only the traditional methods of yesteryear, such as offering church services. Nevertheless, with the recent contentious judgment in the New Zealand case of Liberty Trust v Charities Commission, this article submits that the established doctrines associated with the advancement of religion have been advanced beyond envisioned boundaries. The article supports a more conservative interpretation based on established case law. This would not only continue to support fully the evolution of the advancement of religion, but would also provide judicial certainty in an area of law that is undergoing continued change.*

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## **I INTRODUCTION**

The jurisprudence relating to charitable trusts in New Zealand, as with other Commonwealth jurisdictions, has undergone significant development in recent years as challenging contemporary matters come before the courts. Courts inevitably find themselves addressing the boundaries of common law doctrines to unravel the implied constraints of public policy and doctrinal considerations, and it is clear that the common law offers little in the way of guidance in relation to many of these contemporary challenges. As a result, courts are faced with the prospect of restraining some doctrines when contemporary times suggest the need for expansion of doctrines, or expanding the boundaries at the risk of raising public policy issues. This article considers such issues related to the advancement of religion in light of the recent controversial New Zealand High Court case, *Liberty Trust v Charities Commission*.<sup>1</sup> I submit that, on balance, the judgment advances the

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\* Juliet Chevalier-Watts, Senior Lecturer in Law, Editor in Chief, Waikato Law Review, Te Piringa – Faculty of Law, University of Waikato, New Zealand. BA (Hons), LLB (Hons), LLM (Distinction), PGCLT.

doctrines associated with the advancement of religion beyond envisioned boundaries, and in doing so, generates concerns relating to judicial certainty. Such uncertainty should, in my view, be of primary concern, especially in light of the substantial evolutionary changes to which charitable trusts have been subject in recent times.

Liberty Trust was registered as a charitable entity in 2007 under the Charities Act 2005. Its main activity is to act as a mortgage lending scheme that is funded largely by donations. It makes interest free loans to its donors and others who may apply. The scope of its lending scheme led to a review of its charitable status and then led to the Charities Commission removing the Trust from its charities register.<sup>2</sup>

The Trust appealed that decision, submitting that its lending scheme advanced religion, which fell within the construct of "charitable purpose". The Trust submitted that the lending scheme advanced religion by teaching biblical financial principles. The Charities Commission rejected that submission, stating that teaching financial principles was at best conducive to religion, but this did not mean that it would advance religion. The Commission viewed the lending scheme as furthering private benefits, as opposed to having public benefits.

The argument in the *Liberty Trust* case focused on the advancement of religion, one of the four heads of charity discussed below. Mallon J found that teaching financial principles equated to the teaching of biblical principles and that the loan scheme accorded with the requirements of advancing religion. In addition, Mallon J considered the public benefit element of the scheme (discussed in detail later in the article) and concluded that the loan scheme had sufficient public benefit because anyone could apply for a loan, and there was no element of profit for anyone involved in the scheme.<sup>3</sup>

## **II THE HEADS OF CHARITY**

For a trust to be charitable at law it must meet a number of criteria, including being for charitable purposes and satisfying the public benefit test.<sup>4</sup> In addition, a trust must fall under one of the four heads of charity as set out by Lord Macnaghten in the pivotal case *Commissioners for Special Purposes of the Income Tax v Pemsel*.<sup>5</sup> These four heads are:

- (1) the relief of poverty;

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1 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC).

2 *Ibid*, at [1].

3 At [101]–[125]; for general comment see Jonathan Scragg and Polly Higbee "Liberty's bell tolls for the Charities Commission" *NZ Lawyer* (online ed, Wellington, 12 August 2011) at 16.

4 Juliet Chevalier-Watts "Trusts for Religious Purposes" [2010] NZLJ 55 at 55.

5 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL).

- (2) the advancement of education;
- (3) the advancement of religion; and
- (4) other purposes beneficial to the community not falling under any of the preceding heads.

These heads of charity stemmed from the preamble of the Statute of Elizabeth 1601 (Eng), which set out a non-exhaustive list of charitable purposes recognised at law at the time.<sup>6</sup> These charitable purposes included: the relief of aged and impotent people; the maintenance of sick and maimed soldiers and sailors; the repair of bridges and highways; and the education of orphans, amongst many others. It is possible however that the concept of charity existed long before the Statute of Elizabeth, and appears to have been recognised in the 12th century poem "The Vision of Piers Plowman", which sets out remarkably similar charitable purposes as those set out in the Statute of Elizabeth.<sup>7</sup>

The *Pemsel* categorisation "formed the framework for statutory recognition of charitable purpose, as recognised in s 5(1) of the Charities Act 2005 in New Zealand, and in England and Wales, the Charities Act 2006."<sup>8</sup>

In light of the decision in *Liberty Trust v Charities Commission*, this article critically analyses the response of the law to the shifting sands of religious environments and expectations, and examines whether the law is now permitting an arguably overtly flexible criterion of the advancement of religion.

### III THE MEANING OF RELIGION

Christian beliefs have for centuries been a centre place in Western civilised culture, which has traditionally valued the worship of a single god. Christianity continues to be considered a major religion, but with the advent of advances in travel, media and information, Western cultures have now absorbed many more religions including Islam, Buddhism and Sikhism. The tenets and concepts of such religions may differ substantially from those of Christianity, but the law of charity is concerned not just with the belief in one deity, but the belief in some kind of power of the supernatural.<sup>9</sup> Thus religion is widely construed by the courts:<sup>10</sup>

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6 Also known as the Statute of Charitable Uses 1601 (Eng) 43 Eliz I c 4.

7 William Langland "Vision of Piers Plowman: Passus VII" in Carl Juneau "Is Religion Passé as a Charity?" (1999) 2 Church & the Law Update 1 at 3.

8 Chevalier-Watts, above n 4, at 55.

9 Donovan Waters "The advancement of religion in a pluralist society (Part I): distinguishing religion from giving to 'charity'" (2011) 17 Trusts & Trustees 652 at 653–654.

10 *Church of the New Faith v Commissioner of Pay-roll Tax* [1983] 1 VR 97 (SC) at 136.

... the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice.

Therefore courts will not distinguish between religions.<sup>11</sup> As Gino Dal Pont and DRC Chalmers explain, the "question of whether or not something is a religion turns on its beliefs, practices and observations, not on the verity or meaning of its writings."<sup>12</sup> It has been argued that Buddhism may be the exception to the requirement that a religion for charitable purposes is dependent on a belief in a god, a supernatural or a supreme being, because Buddhism does not adhere to such a belief.<sup>13</sup> In response to this submission, Dillon J in *Re South Place Ethical Society* resisted further discussion by commenting that "I do not think it is necessary to explore that further in this judgment, because I do not know enough about Buddhism."<sup>14</sup> However, Dillon J did acknowledge that Buddhism may be an exception to the rule, as submitted by Lord Denning in *Reg v Registrar General, Ex parte Segerdal*,<sup>15</sup> or in the alternative, that actually it is a religion because of the evidence provided by an expert who denied that Buddhists reject a supreme being.<sup>16</sup> Dillon J was, however, keen to quash any suggestions "that Buddhism is not a religion" although it was a pertinent discussion with regard to the complexities of the meaning of religion and the challenges facing the courts.<sup>17</sup>

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11 See *Thornton v Howe* (1862) 31 Beav 14, 54 ER 1042 (Ch) at 1044.

12 Gino Dal Pont and DRC Chalmers *Equity and Trusts in Australia* (4th ed, Thomson Reuters, New South Wales, 2007) at 757.

13 *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch); see also *United States v Seeger* 380 US 163 (1965).

14 At 1573.

15 *Reg v Registrar General, Ex parte Segerdal* [1970] 2 QB 697 (CA) at 707.

16 *Re South Place Ethical Society*, above n 13, at 1573.

17 *Ibid.*

#### IV *WHEN IS A RELIGION CHARITABLE?*

The question "what is it that makes religion charitable"<sup>18</sup> has been asked and Juneau answers it thus:<sup>19</sup>

Beyond faith, it has taught us to respect human life; it has taught us to respect property; it has taught us to respect God's creation; it has taught us to abhor violence; it has taught us to help one another; it has taught us honesty. In essence what makes religion "good" from a societal point of view is that it makes us want to become better – it makes people become better members of society.

The fact that trusts that advance religion can obtain charitable status has not, however, been without its critics in light of the growing number of agnostics and atheists. Moreover, there is a very real issue (that will be considered in some detail later in the article) as to the actual tangible public benefit in the advancement of religion, not least because religious belief is inevitably such a personal experience. The question therefore arises as to why members of society should shoulder heavy tax burdens merely because of the beliefs of others.<sup>20</sup> There is no simple answer of course to such a question, and it is one that is certainly beyond the remit of this article, but as Mallon J notes:<sup>21</sup>

... our charities law has always accepted "advancement of religion" as a charitable purpose and in so doing has accepted that this is of public benefit such as to be entitled to the special status that entails. Some limit is placed on how far this category will extend by the organisation needing to satisfy the Charities Commission and the courts that they ascribe to a "religion" ... and that the activity they engage in is part of that religion and done for the purpose of advancing that religion.

So although the arguments of those who question the validity of the advancement of religion being charitable are not answered by Mallon J in any specific fashion, what is acknowledged is that there are obligations imposed on those seeking charitable status. Such obligations thus provide some assurance that trusts that advance religion must fulfil certain criteria and are indeed subject to scrutiny. This reduces any preconceived notions that trusts that advance religion are awarded charitable status as a matter of course.

Therefore, for a religious purpose to be construed as charitable at law it must advance religion. This requires "the promotion of spiritual teaching in a broad sense, and involves spreading the

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18 Terence S Carter "Advancing Religion as a Head of Charity: What Are the Boundaries?" (2006) 20 *The Philanthropist* 257 at 261.

19 Juneau, above n 7, at 6.

20 *Liberty Trust v Charities Commission*, above n 1.

21 *Ibid*, at [55].

religious message through taking positive steps such as pastoral activities."<sup>22</sup> It is this very requirement that this article now turns to consider.

## V THE ADVANCEMENT OF RELIGION

The advancement of religion is not defined by statute; rather, it finds its meaning in case law. Donovan J, delivering the judgment of the Divisional Court in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* concluded that:<sup>23</sup>

To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.

In the later case of *Re South Place Ethical Society*, Dillon J made reference to the *United Grand Lodge* case, affirming that whilst freemasons "held out certain standards of truth and justice by which masons were urged to regulate their conduct and ... be reverent, honest, compassionate, loyal ... and chaste"<sup>24</sup> these were "admirable objects" as opposed to being for the advancement of religion. Dillon J also reiterated that "two ... essential attributes of religion are faith and worship; faith in a god and worship of that god."<sup>25</sup>

The approach in the *United Grand Lodge* case, as approved in *Re South Place Ethical Society*, has been affirmed in various jurisdictions, including Canada, where the Supreme Court of Canada noted that:<sup>26</sup>

Religion ... involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship.

New Zealand also ascribes to the notion that the advancement of religion is as prescribed in the *United Grand Lodge* case,<sup>27</sup> although the advancement of religion may be construed more widely than prescribed in that case. It has been widely recognised by the courts that advancing religion may also encompass activities that are secular in nature but which embrace the crucial element of the religious doctrine itself, and this includes activities that address social, moral and ethical issues.<sup>28</sup> In

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22 Juliet Chevalier-Watts "Under the Law of Charity, is the Principle of 'Public Benefit' Being Hindered by the Doctrinal Rule of Precedent?" (2008) 16 Waikato L Rev 194 at 200.

23 *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 1 WLR 1080 (QB) at 1081.

24 *Re South Place Ethical Society*, above n 13, at 1572.

25 *Ibid.*

26 *Walter v Attorney-General of Alberta* (1969) 3 DLR (3d) 1 (SCC) at 9.

27 *Liberty Trust v Charities Commission*, above n 1, at [58].

28 Carter, above n 18, at 269.

the case of *Public Trustee v Hood (Re Hood)* the Court had to determine whether a "gift" (that is, directing the spread of the word of Christianity by encouraging others to take steps to reduce or stop drinking alcohol) was charitable.<sup>29</sup> Lord Hanworth MR confirmed that such a gift was charitable because steps would be taken:<sup>30</sup>

... for the advancement of the Christian Religion, and of Christian principles, by the withdrawal of the subtle and effective force which at the present time operates as a barrier against the advancement of the Christian religion and its principles. ... It does not ... appear that so far [the testator] has indicated anything but a purpose to advance the Christian religion and its principles. Then the direction is that the trust estate is to be held for the purpose of spreading those Christian principles, which, of course, are illustrative of the Christian religion, and also in aiding active steps to get rid of this barrier which prevents its advancement.

In the more recent case of *Lloyds Bank Ltd v Smith (Re Banfield (Deceased))*, the Court considered the work of the Pilsdon Community House.<sup>31</sup> This Community House was a religious community which agreed that prayer, work and practical charity should be its supreme purpose, and it received members of the public who needed help. The House opened its doors to any creed – or those with none – and received and tended to:<sup>32</sup>

... the needs of those members of the public who need help for divers reasons, such as drug addiction, or drink, or having been in prison, or even loneliness or mere failure to stand up to the strains of life.

The Court confirmed that such an organisation exists to further the work of God in a practical sense, and even if a religious body does engage in ancillary activities that are not purely religious, this will not necessarily defeat its religious nature.<sup>33</sup> As a result, the Court stated that this Community House did advance religion and thus should be awarded charitable status.

Such ideals are clearly laudable but I would echo the cautionary sentiments of the Charity Commission of England and Wales that:<sup>34</sup>

It is difficult to see ... how religion is being advanced unless it is possible for members of the public to make the connection in each case between the conduct of pastoral work of a secular kind on the one

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29 *Public Trustee v Hood* [1931] 1 Ch 240 (CA) at 248 [*Re Hood*].

30 *Ibid.*

31 *Lloyds Bank Ltd v Smith* [1968] 1 WLR 846 (Ch) [*Re Banfield (Deceased)*].

32 At 850.

33 *Ibid.*

34 United Kingdom Charity Commission "Analysis of the Law Underpinning the Advancement of Religion for the Public Benefit" (December 2008) <[www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)> at 15.

hand and the advancement of the particular form of faith and worship which is the object of promotion on the other.

In *Re Banfield (Deceased)*, although it was not acknowledged explicitly, the Court did note that the Pilsdon Community reiterated its religious affinity repeatedly in its pamphlet.<sup>35</sup> However, I would submit that this may not necessarily fully answer the concerns raised by the Charity Commission, and perhaps if the case were heard today there would be more active consideration of such an issue. However, the *Liberty Trust* case may provide a contemporary view of the correlation between secular work being carried out by a body and the clear advancement of a religion.

## **A Liberty Trust v Charities Commission**

Liberty Trust was registered as a charitable entity in 2007 under the Charities Act 2005. Its main activity is to act as a mortgage lending scheme, making interest free loans to donors and other people. The scheme is funded mainly by donations. Its lending scheme prompted the Charities Commission to remove the Trust from the Charities Register; Liberty Trust appealed this decision to the High Court.

The Trust asserted that its lending scheme advanced religion by demonstrating practical financial lessons derived from the Bible. The Charities Commission stated that "teaching financial principles derived from the Bible was at best conducive to religion but did not advance religion."<sup>36</sup> The Commission asserted, inter alia, that the Trust's emphasis was not on propagating the Christian doctrine, but rather on educating people through biblical financial principles, which included savings, spending and charitable giving. This then precluded the Trust's objectives from falling under the definition of "advancing religion".<sup>37</sup> The Commission relied on *Roman Catholic Archbishop of Melbourne v Lawlor* as authority for the proposition that teaching biblical financial principles would merely be conducive to religion as opposed to actually advancing religion.<sup>38</sup>

The main question for determination in the *Lawlor* case was whether the establishment of a Catholic newspaper could advance religion. The Court acknowledged that, for it to be a newspaper, it obviously would contain "news" and this is likely to be secular in nature, but questioned whether:<sup>39</sup>

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35 At 850.

36 *Liberty Trust v Charities Commission*, above n 1, at [2].

37 *Ibid*, at [65].

38 *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 (HCA).

39 At 5.

... the Catholic Church [would] be any the less engaged in disseminating its religious doctrines and teachings merely because it chose to reach the public by supplying daily information and news, the main object throughout being the propagation of the faith?

In answering this, the Court determined that the dominant purpose of the newspaper was to instruct Catholics in matters of faith, morals and Catholic teachings. Thus having subsidiary secular matters in the newspaper would not defeat the advancement of religion. Two of the Judges could see no difference between the Church disseminating its religious tenets through the medium of a newspaper and through the ordinary methods of preaching and sermons. Indeed, it was noted that the methods of preaching the faith are not static and will evolve over the years, thus a newspaper is merely evidence of such an evolution in the advancement of religion. The crux of the matter for the Court was whether the newspaper could perform the duties of the Church as it purported to be able to. The Court did not answer this explicitly, although, in a split decision, the Court did express the view that the newspaper is charitable.<sup>40</sup> However, Rich J offered an opposing view, suggesting that the very nature of a newspaper, with the purpose of disseminating "news", is outside the notion of advancing the faith because it would simply remain as a newspaper being merely of general benefit to a body having common interests in faith and aspirations.<sup>41</sup>

Dixon J concurred, noting that for a purpose to advance religion it must "involve the spread or strengthening of spiritual teaching within a wide sense".<sup>42</sup> Not only must the secular activities be inspired by religion; the "purposes must be directly and immediately religious."<sup>43</sup> As a result, Dixon J concluded that the newspaper could not be differentiated from similar newspapers which are not charitable as the newspaper would merely be conducive to religion as opposed to advancing religion.<sup>44</sup>

In the *Liberty Trust* case, Mallon J preferred the submissions of the three Judges in *Lawlor*, Gavan Duffy CJ, Evatt and McTiernan JJ, who adopted a broad view of how religion may be advanced. Gavan Duffy CJ and Evatt J noted that they were:<sup>45</sup>

... quite unable to see the difference between the Catholic Church's propagating its religious tenets and regulating the performance of religious duties (1) through a medium reaching into the homes of the multitude, including Catholics and non-Catholics, and (2) through the ordinary medium of sermons and

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40 At 17–18.

41 At 23.

42 At 32.

43 Ibid.

44 At 36.

45 At 16.

tracts. The former may be as much a method of preaching the gospel as the more direct and obvious method of strengthening or extending faith through missions and sermons.

I respectfully concur that this is the correct approach to take because it acknowledges the advancements in society regarding religious instruction and its dissemination. The law has already acknowledged the diversity of religions being caught under the *Pemsel* head of "advancement of religion", many of which undoubtedly could not have been foreseen at the time of the enactment of the Statute of Elizabeth. I submit that it is not such a great step to recognise that religion may be advanced through a religious newspaper, so long as the dominant purpose of that newspaper is to instruct those of that religion in "matters of faith and morals and of advancing and spreading the faith and teachings".<sup>46</sup> Likewise, the teachings about budgeting and financial matters of the Liberty Trust are biblical teachings that are indeed presented as part of the "Word of God". There is no issue here for the Liberty Trust in disseminating secular information because the teachings disseminated by the Trust appear to maintain the religious doctrines upon which the teachings rest, and to promote and manifest those tenets. Therefore the biblical financial principles as taught by the Liberty Trust "are an aspect of Christian Faith as expounded by Liberty Trust"<sup>47</sup> and such a finding casts doubt upon the original proposition that the judgment advances doctrines beyond envisioned boundaries.

### ***B The Advancement of Religion in Liberty Trust***

A question arises regarding the issue of Liberty Trust's loan scheme and whether Mallon J's determination that such a loan scheme does indeed advance religion is correct, or whether the decision profoundly bends the exigencies of the notions of the advancement of religion.

Liberty Trust submitted that the loan scheme was a practical outworking of the Christian faith, and that one of the key concerns of the New Testament is that of the proper use of money and further, that freeing up those with financial burdens ensures that those individuals are then freer to carry out God's services.<sup>48</sup> This latter point in particular was not addressed specifically by the Court, although the fact that it was asserted by Liberty Trust raises an interesting issue. In the recent case of *Canterbury Development Corp v Charities Commission*, the Court was asked to consider whether a community development purpose was a charitable purpose under New Zealand law.<sup>49</sup> The appellant submitted that the work of Canterbury Development Corporation (CDC) would lead to the generation of jobs and would advantage the overall economic condition of the region.<sup>50</sup> The Court

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46 *Roman Catholic Archbishop of Melbourne v Lawlor*, above n 38, at 15.

47 *Liberty Trust v Charities Commission*, above n 1, at [69].

48 *Ibid*, at [79].

49 *Canterbury Development Corp v Charities Commission* [2010] 2 NZLR 707 (HC).

50 At [39].

acknowledged that the objects and work of CDC were indeed commendable, but having commendable objects did not automatically meet the charitable purpose requirements. Instead the Court said "[t]hese are essentially the provision of help to individual businesses in the hope they will grow."<sup>51</sup> In other words, the purposes must be more than hopeful, they must explicitly support a charitable purpose. Thus if the Liberty Trust unburdens individuals of their financial woes by providing financial assistance, there is a hope that in doing so, those individuals will be more able to service God's will. As with the *Canterbury Development Corp* case, this surely is no more than a hope. Whilst eminently commendable, removing individuals' financial burdens is not in itself a charitable purpose, and would suggest therefore that the Trust fails on this issue of charity. This matter will be considered further, later in this article. Though it is acknowledged that this is a moot point because it was not explicitly addressed by the Court, it will, however, be interesting to see if such an issue arises in future cases and how the Court will interpret such commendable objects.

Instead, Mallon J in *Liberty Trust* considered the issues relating to the practical outworkings and advancement of religion and whether some activities may have a connection with religion while not actually constituting the advancement of religion. Mallon J referred in some detail to the opinion of Mahoney JA in the case of *Presbyterian Church (NSW) Property Trust v Ryde Municipal Council*.<sup>52</sup> Mahoney JA submitted that:<sup>53</sup>

Those purposes which are religious purposes within the law of charities, therefore, comprehend, not merely the formulation of doctrine and its propagation and the winning of adherents to it, but also certain of the means by which the religion is practised, e.g., the building of churches, the employment of ministers, and the holding of public services or ceremonies as prescribed by the religion. But the purposes of a church, may, and often do, extend beyond such purposes.

Further Mahoney JA concluded that, certainly in relation to the instant case, the advancement of religion should not just be limited to the formulation and propagation of the doctrine, or the conduct of the relevant rituals.<sup>54</sup> Religion may be advanced by bodies other than churches, although just because a body executes the advancement of religion, this does not automatically mean that the purposes of such bodies would be charitable.<sup>55</sup> The *Ryde* case did not concern a church, but Mahoney JA determined that this should not preclude the Trust from being charitable because:<sup>56</sup>

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51 At [44].

52 *Presbyterian Church (NSW) Property Trust v Ryde Municipal Council* [1978] 38 LGRA 199 (NSWCA).

53 At 213.

54 At 215.

55 At 219.

56 At 222.

... where a church or analogous body has as one of the purposes to which its property may be applied a purpose which is not a mere ulterior secular purpose, but one directed to and able to be seen as assisting in the advancement of its religious purpose, then the purpose of that religion will be able to be held religious for present purposes.

Thus, in Mahoney JA's view, the Trust was "so intimately connected to the Church, that it should be accepted as within the same principle."<sup>57</sup> Liberty Trust submitted that the Trust advanced religion through its practical outworkings in a similar fashion to that of the *Ryde* case, and that *Ryde* confirmed that these are activities that may be carried out by secular bodies. Mallon J agreed that this was the correct approach, and further dismissed the Charities Commission's notion that the Liberty Trust could not be construed as advancing religion because it was not a church. The *Ryde* case clearly states that a secular body can advance religious purposes, although the functions of that body should be intimately connected with a church. Liberty Trust asserted that it is a trust set up to undertake Christian ministrations of the Whakatane Baptist and the Whakatane Christian Fellowship Church, and Mallon J acknowledged the case of *Re Hood* as an example of an external body undertaking the advancement of religion but endeavouring to minimise the alcohol trade. Her Honour also acknowledged *Re Banfield*, where a religious community open to all faiths and creeds carried out Christian work to improve the lives of those who needed such assistance.<sup>58</sup> There is no doubting that case law reflects the broad interpretation of the meaning of "advancement of religion" and that there is no reason why religious activities should be limited merely to traditional formulations associated with soul saving and sanctification. Thus the original proposition offers superficial assistance. Therefore, prima facie, *Liberty Trust* provides an example of non-secular activities being carried out by a secular body, although as required by the *Ryde* case, its functions are connected closely enough with a church that as a result, its activities may comply with the requirements of advancing religion. However, the question still remains as to whether the loan scheme falls within the constructs of advancing religion.

Mallon J was clear that "a mortgage scheme in and of itself is not an obvious candidate for the 'advancement of religion'".<sup>59</sup> It would not advance religion automatically merely because it is operated by those who subscribe to the religion, or because its founder believes that the scheme propagates the will of God, or His teachings. Mallon J rightly stated that the scheme must do more than have a connection with, or be conducive to, religion. Her Honour asserted that the lending scheme teaches religion as intended by the Scriptures and as a result spreads the message of religion, or in the alternative, advances religion by taking steps to sustain and increase religious beliefs. Mallon J made no more reference explicitly to the latter issue of how those who obtain

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<sup>57</sup> Ibid.

<sup>58</sup> *Re Banfield (Deceased)*, above n 31.

<sup>59</sup> *Liberty Trust v Charities Commission*, above n 1, at [93].

money will therefore sustain and increase religious beliefs, although the judgment did make reference in the footnotes to an affidavit that stated:<sup>60</sup>

It is also hoped and expected that once the borrower has repaid the principal of their loan they, as God's stewards of their money, will increase their Christian giving and/or the giving of their time to Christian services.

### **C Conclusions on Liberty Trust**

As noted earlier in the article, the *Canterbury Development Corp* case firmly entrenched the notion that, whilst the desire to assist others is laudable, there must be a sufficient connection between that object and the actual purpose that it is intended to relieve. The affidavit above clearly denotes that the Liberty Trust merely "hopes" that the borrower will increase their Christian giving and/or giving of their time. I submit that the possibility of helping others in this fashion is too remote for it to qualify as a charitable purpose. I do acknowledge that the affidavit also mentions the word "expects". However the Trust did also state that only a limited survey was undertaken on this matter and not all borrowers did indeed fulfil this expectation, thus highlighting the meaninglessness of the word "expectation" and emphasising instead that the real essence of the advancement of religion in this context is merely a hope, rather than an expectation.<sup>61</sup> Mallon J does note that contributors do not determine whether they will actually receive a loan, nor how much it will be worth; and if a loan is received it must be repaid in full with the repayments being circulated for the use of others.<sup>62</sup> However, there is no further explanation forthcoming as to the application of these figures and statements. As a result, I respectfully suggest that this element of the submission requires further consideration, and as it stands, I cannot distinguish it from the established argument in the *Canterbury Development Corp* case, that the purposes of the Trust must represent more than a hope.

I do however concur fully with Mallon J that the Liberty Trust clearly has its foundations in religion and that the Trust undertakes to perform good works, as opposed to merely defining good works.<sup>63</sup> Conversely, I do not concur with Mallon J's view that the work of the Liberty Trust is the same as that of the work carried out by the Pilsdon Community in *Re Banfield (Deceased)*, as referred to earlier in this article. The Pilsdon Community reached out to those in need and provided practical Christian support; theirs was a tangible assistance. Whilst the lending scheme provided by the Liberty Trust may operate under two churches, and the message is undoubtedly religious, I submit that *Re Banfield (Deceased)* may be distinguished because the purposes of the two trusts,

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60 Ibid, at fn 62.

61 Ibid.

62 *Liberty Trust v Charities Commission*, above n 1, at [115].

63 At [96].

and their functions, are different. By its own admissions, the Liberty Trust demonstrates biblical principles by loaning interest free money to enable the borrower to live debt free, thus enabling them to "be free to fulfil God's call upon their lives."<sup>64</sup> There is no consideration as to how this will be achieved, and as the affidavit states, fulfilling God's call may be expected, but is not guaranteed.

The Trust also clearly states that the contributions "assist with our charitable activities *and* build an interest free storehouse to help others."<sup>65</sup> The use of the word "and" indicates that the Trust has two purposes: the first is to provide charitable assistance to others, and the second is to provide interest free loans, thus precluding the latter from being included in its charitable considerations, although it may indeed have its basis in religious teachings. The question then arises as to the actual overall purpose of the Liberty Trust. This answer can again be found in the words of the Trust. It states that a contribution to the Trust:<sup>66</sup>

... is a donation to Liberty Trust to help others. Approximately 5% is currently spent teaching the Bible's financial principles and assisting the poor and our administration, and the remaining 95% builds our storehouse to assist others.

The dominant purpose of the Trust is therefore to provide interest free loans, whilst its ancillary purpose is to teach the Bible's financial principles, assist those in need and administer the Trust.

It may be argued that the provision of interest free loans is ancillary to the teaching of the Bible's financial principles and assisting the poor, but discussions in both *Re Education New Zealand Trust*<sup>67</sup> and *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*<sup>68</sup> suggest that where a trust activity constitutes 30 per cent of the trust's overall activities, then this could not be construed as ancillary, and indeed, must be considered as a dominant purpose.<sup>69</sup> I submit therefore that on the facts the Liberty Trust differs greatly from *Re Banfield (Deceased)*, and as such, should be distinguished. Additionally, the overall purpose of the Liberty Trust is not charitable because its overall purpose is to provide interest free loans. I do not support the notion that those loans fulfil the requirements of advancing religion. Indeed, it would appear that the Liberty Trust itself, as evidenced by the public information provided, also separates its charitable work from its lending scheme.

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64 Liberty Trust "Questions & Answers" <www.libertytrust.co.nz> at Question 1.

65 Ibid, at Question 2 (emphasis added).

66 Ibid, at Question 5.

67 *Re Education New Zealand Trust* (2010) 24 NZTC 24 (HC).

68 *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) [*Grand Lodge*].

69 For further discussion see Juliet Chevalier-Watts "Freemasonry and Charity" [2011] NZLJ 50 at 50–53.

Therefore, I cannot concur with Mallon J's conclusion that "Liberty Trust's activities are within the existing bounds of this category."<sup>70</sup> In addition, I am surprised by Mallon J's further comment that to find otherwise "would be to confine advancement of religion back to church services, the building of churches and the like which is not in keeping with ... *Lawlor*."<sup>71</sup> Mallon J most pertinently noted that the point in *Lawlor* is that "methods of preaching and extending a gospel or a faith alter and develop with the changing years"<sup>72</sup> and many cases reflect the fact that practical outworkings are now accepted as advancing religion. However, if Mallon J were to have found that the Liberty Trust did not fulfil the requirements of advancing religion, this would not have undermined or negated the established authorities which state that the concept of the advancement of religion has evolved over the years. That notion is still true, and will remain true. However, the real question is whether the loan scheme that underpins the purposes of the Liberty Trust truly advances religion. The evidence suggests that such a loan scheme does not advance religion, even when one acknowledges the evolution of this charitable head, because the notion of helping advance the teachings of the Bible through a loan scheme is too remote a possibility. In contrast to Mallon J's well-reasoned view, I submit that finding the loan scheme to advance religion extends that charitable head beyond the prescribed realms of advancing religion. It potentially undermines the strict criteria that the courts and the Charities Commission have been keen to sustain in order to maintain the value to charities, and to maintain public trust and confidence in the stringent requirements of obtaining charitable status.

## **VI PUBLIC BENEFIT**

A trust must also carry out its purposes for the benefit of the public, or at least a sufficient section of the public. Gifts for the advancement of religion will generally be presumed to confer a public benefit,<sup>73</sup> so although the starting point is the presumption of public benefit, "it remains for the court to be satisfied that the gift satisfies the public benefit requirement."<sup>74</sup>

### **A Public Benefit Test**

In the present case there was no issue with the objects of the Trust being contrary to public policy, nor with the aims of biblical or Christian teachings. The issue is rather whether the scheme conferred a private or public benefit.

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70 *Liberty Trust v Charities Commission*, above n 1, at [98].

71 *Ibid.*

72 *Ibid.*

73 See *Chevalier-Watts*, above n 4, at 56 for further discussion on the presumption of public benefit. See also Charities Act 2006 (UK), s 3, which has removed the presumption of public benefit in the United Kingdom.

74 *Liberty Trust v Charities Commission*, above n 1, at [100].

The Charities Commission submitted that:<sup>75</sup>

... Liberty Trust's scheme is simply "edification by example" which does not meet the public benefit test. The [Charities Commission] submits that this is because the scheme principally confers private benefits whereas, to be a charitable purpose, any private benefit must be ancillary to the wider charitable purpose. The [Charities Commission] submits that any wider community benefit from a mortgage scheme, not based on need, but based on religious financial principles is too remote.

The Charities Commission relied on the principles expounded in *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand (Grand Lodge)* concerning public benefit. In this case it was stated that whilst there may have been a public benefit, the organisation primarily existed for the self-improvement of its members, and whilst that is undoubtedly laudable, this does not meet the stringent requirements of conferring a public benefit, and indeed, any conferred public benefit would be too remote.<sup>76</sup> Mallon J in the instant case quickly discounted the relevance of *Grand Lodge*, noting that "a difference between that case and the position here is that Liberty Trust's edifying example is directly linked to the Christian faith."<sup>77</sup> It is correct that the *Grand Lodge* case does not link directly to matters pertaining to religion. However, the principles pertaining to private benefit still remain, thus perhaps should not have been discounted quite so readily. Instead, Mallon J referred to the relevance of *Gilmour v Coates*<sup>78</sup> and *Re Hetherington*<sup>79</sup> as religiously pertinent cases.<sup>80</sup>

In the former case, the Court had to consider whether a gift to a closed order of nuns had sufficient public benefit. The Court determined that the edifying benefits of private prayer on the public and the nuns' efforts in achieving their own salvation would not construe a sufficient and tangible enough public benefit. Therefore the gift failed to be charitable. Mallon J noted that Liberty Trust rejected the notion that *Gilmour v Coates*, and other private religion purposes, were applicable in the present situation, stating that the Trust's edifying example is visible because it is a scheme that is open to all and there is continuing communication encouraging the advancement of religion. In this respect, the preferred case is that of *Re Hetherington*, in which a gift for the celebration of public masses was held to be charitable because the public that attended would benefit from the improving effect of such a celebration.

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75 At [116].

76 At [60].

77 At [117].

78 *Gilmour v Coates* [1949] AC 426 (HL).

79 *Re Hetherington* [1989] 2 WLR 1094 (Ch).

80 *Liberty Trust v Charities Commission*, above n 1, at [118]–[120].

Mallon J accepted Liberty Trust's submission that *Gilmour v Coates* and *Grand Lodge* should be distinguished because the scheme in the present case is open to the public. Whilst the contributors to the scheme receive a private benefit, in other words, a loan, that private benefit is part and parcel of Christian living. The contributors therefore accept that the scheme is a religious one.<sup>81</sup>

### ***B Public Benefit in Liberty Trust***

I acknowledge without issue that there can be no doubt that the scheme in the present case is linked to religion, as made clear by the Liberty Trust and by Mallon J, but I am not persuaded that the loan scheme would directly confer the requisite public benefit. In finding that it does, *Liberty Trust* has extended the doctrine of the advancement of religion beyond the realms envisioned. Mallon J stated explicitly that "private benefit is part and parcel of Christian living".<sup>82</sup> This may be an accepted fact but beyond that there must be an overall purpose of public benefit, so the private benefit should be ancillary to the public benefit. The desire of the Trust is to assist those receiving the loan to live debt free so that Christian works may be accomplished more readily. As has already been discussed, this is a hope – albeit a commendable one – and case law is clear that a mere hope does not equate to a charitable purpose. Mallon J stated that she finds it "difficult to distinguish [the scheme] from a mass in a Church which is open to the public."<sup>83</sup> I respectfully submit that a mortgage scheme established to relieve private financial impecuniosities with a connection to the Christian faith may be distinguished from public prayers whose prime purpose is to propagate the Christian faith, because the benefits of the loan scheme are too narrowly focused on its adherents. As Mallon J so pertinently states, the scheme is about being able to "lead a Christian life free of the burdens of debt",<sup>84</sup> which appears primarily to support the notion of private benefit. In respect of this assertion, I think it pertinent to consider the public benefit matters so rigorously addressed in the cases of *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue (Presbyterian Church)*<sup>85</sup> and *Hester v Commissioner of Inland Revenue (Hester)*.<sup>86</sup>

In the former case, the Presbyterian Church created a Beneficiary Fund for the benefit of retired ministers of the Church. The Fund fell within a superannuation category. The primary benefits available under the Fund were payments of an annuity to retiring ministers, as well as other financial benefits. The consideration for the Court, inter alia, was whether there was sufficient public benefit

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81 *Ibid*, at [121]–[122].

82 At [121].

83 At [122].

84 At [125].

85 *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 (HC) [*Presbyterian Church*].

86 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) [*Hester*].

for the Fund to be charitable. It is acknowledged that the facts differ from those of the *Liberty Trust* case, however it is submitted that the principles are still entirely relevant because of the key issue of the advancement of religion. In its considerations, the Court reflected upon the Commissioner's view that the purpose of the Fund was not to advance religion but to provide benefits to the members of the Fund, thus depriving the Fund of having any public benefit.<sup>87</sup> The Court concurred, noting that the Fund's objectives were to protect its ministers by ensuring that they were financially secure enough throughout their lifetime with the Church "in accordance with the mutual commitment of the Church and minister to a lifelong undertaking."<sup>88</sup> It was this close connection with the Church that provided the Court with the answer to the issue of public benefit because "where the overall purpose goes to the benefit of persons who are demonstrably part of the structural workings of the Church overall"<sup>89</sup> then the public benefit test is met. In providing such financial support, the ministers will be supported for their lifetime by the Church, thus ensuring the Christian faith is expounded. Therefore, even though the private benefit was not incidental, when considered in the context of the Church and its ministrations, the purpose was deemed charitable. In other words:<sup>90</sup>

... the relevant nexus exists and the retired ministers who financially benefit are an integral part of the structure and workings of the Church and without them the Church would cease to exist. Neither would they have been induced to take up their calling without the assurance of lifetime security in the manner described and uncontroverted in the evidence.

Therefore, although there is a private benefit to the ministers, without this benefit, the Church would suffer detriment; therefore the very nature of the fund deprives it of a private benefit.<sup>91</sup> It is submitted that the requirement for the existence of a nexus is a relevant consideration in relation to the scheme in *Liberty Trust*, and I would argue that in applying the principles developed in *Presbyterian Church* to the *Liberty Trust* case, the nexus between the beneficiaries of the scheme in *Liberty Trust* and the Church cannot be made out. The purpose of the scheme is to alleviate financial hardship with the desire that the principles of the Christian religion should be expounded as a result of releasing the recipient of financial burdens. This link is not made out in the later case as it is so succinctly in the earlier case. The private benefit, although not necessarily incidental in the *Presbyterian Church* case, is so deeply ingrained in the overall context of the Church that the public benefit could not exist without the private benefit. Conversely in the *Liberty Trust* case no such fundamental commitments exist, and the churches under which the *Liberty Trust* sits would not fail

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87 *Presbyterian Church*, above n 85, at 370.

88 At 371.

89 *Ibid.*

90 At 372.

91 At 376.

as a result of the financial benefits not being available to the beneficiaries of the Fund. This therefore indicates that the private benefit in *Liberty Trust* is not negated.

The *Hester* case indicates, at least impliedly, the discomfort the courts feel at addressing the issue of public benefit and advancement of religion. It considers further, and in great detail, the thorny issues raised in the *Presbyterian Church* case relating to superannuation plans, and, inter alia, the challenges faced by the courts when considering public and private benefit. Whilst the Court of Appeal in the later case confirmed that the private benefit for ministers receiving such funds was not inconsistent with the requirements of charitable trusts, charitable status could not be extended to trusts for church employees generally.

Hammond J in *Hester* eloquently sets out the pitfalls of considering such difficult and contemporary matters, which represent the very foundations of the original proposition, stating:<sup>92</sup>

... given the very considerable concessions made to charities, and given much contemporary agnosticism and even seeming indifference in many quarters to religion, what is it that today supports the concession in favour of religious charities, and more particularly, where are the edges of this head of charity to be drawn?

I believe this is a key consideration for any court when determining contemporaneous matters relating to the advancement of religion. The Court of Appeal in *Hester* clearly had such matters at the forefront of its considerations because it regarded *Presbyterian Church* as being at "the outermost limits of the existing doctrine"<sup>93</sup> and stated "the scheme under consideration [in *Hester*] is well beyond the existing doctrine for an allowable religious charitable trust"<sup>94</sup> because it was too broadly conceived. In applying this concern to the *Liberty Trust* case, I submit that such concerns are analogous to those set out in this latest case. I note that Mallon J in *Liberty Trust* did indeed acknowledge the cautionary words offered by Hammond J in *Hester* regarding the bounds of the doctrine, although it was noted that "where the bounds of this head of charity properly are drawn is not necessarily clear."<sup>95</sup> Mallon J's concerns about such boundaries are certainly not without foundation, as case law does little to offer assistance with regard to such contemporary challenges. However, taking into consideration the very real concerns expressed in *Hester*, it would perhaps be prudent to exercise a generally conservative approach in cases where the private and public benefit dichotomy might be conceived to be on such a cusp. This is because once the boundaries are extended, the support for the concessions offered to such charities may wane, and the doctrine itself will be seen to be strained beyond conceivable recognition.

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92 *Hester*, above n 86, at [6].

93 At [11].

94 At [14].

95 *Liberty Trust v Charities Commission*, above n 1, at [55].

### ***C Conclusions on the Public Benefit Test***

As a result, I submit that the public benefit test in the *Liberty Trust* case has been rebutted and that, whilst there is no doubt that contemporary challenges generally require contemporary answers, there are some circumstances in which a conservative approach might be more favourable in order to provide judicial certainty and to prevent possible concerns being raised with regard to policy issues. In rebutting the public benefit test I submit that there would be no issue with confining the advancement of religion to the confines of church services, or to the traditional methods associated with propagating religious views, because case law already supports the evolution of the practical outworkings of advancing religion. What is perhaps not supported in case law is the development of the public benefit test in such controversial circumstances since the repercussions for such development could be far-reaching.

### **VII CONCLUSION**

There is no doubting the difficulties faced by the courts when having to determine such matters. Preceding case law offers so little in terms of guidance or limitations on such modern day matters, and it is expected that the jurisprudence will continue to evolve in these areas as it has been doing for decades. However, although change may be welcomed in order to clarify uncertainty or to provide much needed interpretation of the common law or statutes, some changes that occur may be to the apparent detriment of such certainties and their appearance may undermine established doctrines.

The advancement of religion is undoubtedly a controversial head of charity because its foundations are based on a system of beliefs that are at best intangible, and at worst openly criticised by non-believers, especially when the New Zealand case law supports the notion that the public benefit associated with the advancement of religion should be presumed. Decades of case law support the evolution of the advancement of religion and how it may be undertaken, and the author firmly supports the ethos that the outworkings of religions should not be constrained to the traditional methods employed from yesteryear. The author does however contend that certain aspects relating to the advancement of religion should be interpreted in a more conservative manner (as expressed keenly in cases such as *Presbyterian Church* and *Hester*) in order to set more defined boundaries, which are currently clearly absent. Such boundaries would not be to the detriment of the advancement of religion, nor would they presuppose that the advancement of religion should cease to evolve, as clearly socio-economic advances will always underpin and encourage such developments, and charities and the law must meet those demands. However, where an issue is on such a controversial cusp, as in the matter of the *Liberty Trust*, and the jurisprudence suggests that such matters should be approached with caution, then the author supports judicial caution in determining whether to expand the existing boundaries so extensively. It is hoped that when further cases of a similar nature come before the courts, as inevitably will occur, the courts will look to the effect of expanding such doctrines and will question whether such evolution will further, or rather, detract from judicial certainty.